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IN THE SUPREME COURT OF THE STATE OF IDAHO

DARYL L. REID,)	
)	NO. 39850
Petitioner-Appellant,)	
)	BEAR LAKE COUNTY NO. CV-2011-255
v.)	
)	
STATE OF IDAHO ,)	APPELLANT'S BRIEF
)	
Respondent.)	
_____)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BEAR LAKE

HONORABLE MITCHELL W. BROWN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Daryl Reid appeals from the district court's order summarily dismissing his petition for post-conviction relief, as well as its order denying him assistance of post-conviction counsel. In his petition, Mr. Reid asserted that the defense attorney in his criminal case provided ineffective assistance of counsel insofar as he was aware that the prosecution's witnesses in his case were "involved in pre-trial communications, as well as during the trial to ensure they got their story straight" and "groom[ed] their story to make it more convincing to the jury,"¹ the trial attorney did nothing to stop that manufacturing of testimony, thereby depriving Mr. Reid of a fair trial. He contends that these allegations of fact, set forth in his verified petition for relief and his affidavit in support of his petition, assert the possibility of a valid claim. As such, he asserts that he should have been appointed counsel in this case.

He also contends that the district court's decision to summarily dismiss his case, based solely on its finding that he only made bare and conclusory allegations, is erroneous and should be reversed, most notably because his verified pleadings constitute facts upon which his claim could proceed. Because there is no evidence offered in contradiction of his assertions, those assertions must be construed in his favor. Those facts, if true, would entitle him to relief, and therefore, an evidentiary hearing was required. As such, Mr. Reid respectfully requests this Court reverse the

¹ Essentially, Mr. Reid's claim was that the State's witnesses were collaborating to manufacture testimony that was not necessarily true. He also speculated that his trial attorney was somehow involved in that collaboration, but absent any additional evidence, he is not pursuing that aspect of his claim at this time. However, he would reserve the right to pursue it further if new evidence comes to light on remand.

district court's orders denying him post-conviction counsel and summarily dismissing his petition.

Statement of the Facts and Course of Proceedings

Mr. Reid was convicted by a jury of one count of rape, one count of misdemeanor battery, and numerous counts of lewd conduct and sexual battery. (R., pp.4, 10.) In his petition, Mr. Reid asserted that the district court sentenced him to a unified life sentence, with an aggregate fixed term of thirty-three years.² (R., p.4.) That sentence was imposed on July 2, 2009. (R., pp.4, 10.) Mr. Reid appealed from that judgment and the judgments of conviction were affirmed on July 25, 2011. *State v. Reid*, 2011 Unpublished Opinion No. 559 (Ct. App. 2011).

Mr. Reid subsequently filed a timely verified petition for post-conviction relief. (R., pp.4-8.) He also filed an affidavit in support of that petition, as well as a request to have counsel appointed to his case. (Augmentation – Affidavit in Support of Petition for Post Conviction; Augmentation – Motion and Affidavit in Support for Appointment of Counsel.) His primary assertion was that the prosecution witnesses had been allowed to synchronize their stories and thereby manufacture testimony, thus depriving him of a fair trial. (See, e.g., R., pp.5, 7, 8; Augmentation – Affidavit in Support of Petition for Post-Conviction, p.2.) Mr. Reid also alleged in his Affidavit in Support of his petition, that his attorney was unprepared to defend him during the trial. (Augmentation – Affidavit in Support of Petition for Post-Conviction, p.2.) Between the verified petition

² The State denied this assertion in its answer as an incorrect statement of his sentence. (R., p.10.) It did not, however, explain its denial nor articulate what sentence it believes Mr. Reid is serving. (See *generally*, R., pp.9-12.) The Court of Appeals' unpublished opinion corroborates Mr. Reid's assertion that he is serving an aggregate sentence of thirty-three years. *State v. Reid*, 2011 Unpublished Opinion No. 559 (Ct. App. 2011).

and the separate affidavit, Mr. Reid attested to the following facts: the prosecution witnesses were allowed to synchronize their testimony, his attorney was aware that the prosecution witnesses were being allowed to discuss and manufacture that testimony, his attorney did nothing to stop the manufacturing of testimony, and his attorney was not prepared to defend him at trial.³ (R., pp.5, 7, 8; Augmentation – Affidavit in Support of Petition for Post-Conviction, p.2.) Mr. Reid also asserted that additional facts and evidence would be presented by testimony at the evidentiary hearing (though he did not identify who would testify or as to what they would testify). (Augmentation – Affidavit in Support of Petition for Post-Conviction, p.2.)

In its answer, the State denied Mr. Reid's allegations, but it did not provide any evidence to contradict his allegations. (See R., pp.9-12.) The district court did not take judicial notice of the record from the underlying case, nor did it order any portions of the transcripts for the hearings in that case to be prepared for its review of Mr. Reid's petition. (See *generally* R.) The district court asserted in its notice of intent to dismiss that "Petitioner's affidavit in support of his Petition for Post-Conviction Relief contains very little, if any, factual material," and so it stated its intent to dismiss the petition because it contained only bare and conclusory allegations. (R., pp.20-21.) For the same reasons, it denied his request for appointment of counsel. (R., pp.19-20.) The district court also held that other issues Mr. Reid identified in his pleadings, such as his arguments about the introduction of 404(b) evidence at his trial, had been resolved in the direct appeal, and therefore, were procedurally barred from consideration in post-conviction. (R., p.21.)

³ An example of Mr. Reid's assertions in this regard was that his attorney failed to fight the admission of certain character evidence under I.R.E. 404(b). (See, e.g., R., p.8.)

Mr. Reid responded to that notice of intent to dismiss by reminding the district court that, at the summary judgment stage of a post-conviction proceeding, the inferences of the facts in the record were to be construed in his favor, as he was the nonmoving party, and that all he was required to do was allege facts showing the possibility of his claim. (R., pp.28-29.) He asserted that his claims would be proved by a review of the entire record of the case below. (R., p.27.) Therefore, he requested the district court schedule an evidentiary hearing to resolve the issues of fact presented in his verified petitions which, if resolved in his favor, would entitle him to relief. (See R., p.31.)

The district court, however, determined that no genuine issues of material fact existed, and therefore, summarily dismissed Mr. Reid's petition for post-conviction relief. (R., pp.35-37.) Mr. Reid filed a timely notice of appeal from that order.

ISSUES

1. Whether the district court erred when it summarily dismissed Mr. Reid's petition for post-conviction relief, failing to consider the factual allegations made in Mr. Reid's verified petition when it did so.
2. Whether the district court erred when it denied Mr. Reid's motion to appoint post-conviction counsel.

ARGUMENT

I.

The District Court Erred When It Summarily Dismissed Mr. Reid's Petition For Post-Conviction Relief, Failing To Consider The Factual Allegations Made In Mr. Reid's Verified Petition When It Did So

A. Introduction

Summary dismissal of Mr. Reid's post-conviction petition was erroneous. Mr. Reid alleged various facts which, if true, would show that his attorney did not provide objectively reasonable assistance, and that failure prejudiced Mr. Reid, depriving him of a fair trial. The State denied those facts without providing any contradictory facts. The district court also did not take judicial notice of any of the record or transcripts from the case below. As a result, the only facts in the record upon which to resolve the question of summary disposition were those alleged by Mr. Reid. As he is the non-moving party, all factual issues and reasonable inferences therefrom are to be resolved in his favor. Therefore, he has alleged sufficient facts to survive summary dismissal. This case contains a genuine issue of material fact, and therefore, requires an evidentiary hearing. This Court should reverse the district court's order of summary dismissal and remand this case for such a hearing.

B. When Properly Analyzed, With All Presumptions Drawn In His Favor, The Facts Alleged By Mr. Reid In His Verified Pleadings Establish A Genuine Issue Of Material Fact Entitling Him To An Evidentiary Hearing

Summary disposition of a post-conviction petition on the pleadings and record is not proper if a material issue of fact exists. I.C. § 19-4906(c). When genuine issues of material fact exist that would entitle the applicant to relief, if resolved in the applicant's

favor, summary disposition is improper and an evidentiary hearing must be conducted. *Baldwin v. State*, 145 Idaho 148, 153 (2008).

When reviewing a district court's order of summary dismissal in a post-conviction relief proceeding, the reviewing court applies the same standard as that applied by the district court. *Ridgley v. State*, 148 Idaho 671, 675 (2010). Therefore, on review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court determines whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file, and it liberally construes the facts and reasonable inferences in favor of the non-moving party. *Charboneau v. State* (hereinafter, *Charboneau II*), 144 Idaho 900, 903 (2007). The lower court's legal conclusions are reviewed *de novo*. *Owen v. State*, 130 Idaho 715, 716 (1997).

When summary dismissal is an issue and the facts are disputed, a court is required to accept the petitioner's un rebutted factual allegations as true. *Charboneau II*, 144 Idaho at 903. It does not, however, have to accept the petitioner's conclusions as to the impact of those facts on his claims. See *id.* Where the petitioner's factual allegations are rebutted and the case is still dismissed without an evidentiary hearing, "this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party." *Workman v. State*, 144 Idaho 518, 523 (2007). In this case, Mr. Reid is the non-moving party. (See R., p.12.)

The only situations in which allegations contained in the application will be insufficient for relief is where they are either clearly disproved by the record or do not justify relief as a matter of law. *Id.* Where pleadings are verified, they are treated as

affidavits and are admissible evidence in post-conviction proceedings. See *Mata v. State*, 124 Idaho 588, 593 (Ct. App. 1993); I.C. § 19-4907(a). As such, Mr. Reid's verified pleadings constitute facts for this Court to consider.⁴ (See R., pp.4-8.) The State denied those allegations without explanation or presentation of additional contradictory facts. (R., pp.9-11.) When the State's answer contains only general denials, the Court of Appeals has held that "[w]e merely recognize that factual issues exist as to those allegations which are denied. The legal question which still must be addressed is whether *any* of the allegations, disputed or not, set forth facts which, if found to be true, would entitle the applicant to some relief." *Whitehawk v. State*, 116 Idaho 831, 834 (Ct. App. 1989) (emphasis in original); see also *Baldwin*, 145 Idaho at 153. Essentially, all that the State's general denials of those facts did was to create

⁴ The district court asserted that "Petitioner's affidavit in support of his Petition for Post-Conviction Relief contains very little, if any, factual material," and so dismissed the petition because it contained only bare and conclusory allegations. (R., pp.20-21.) However, because that petition was verified, it constitutes the facts in the record, which included such factual assertions as "all of the state[']s witnesses were involved in pre-trial communications, as well as during the trial to ensure they got their story straight," (R., p.5), "[t]he Court allowed the Prosecutor[']s witnesses to engage in pre-trial communications, as well as pre-testimony communications in order to groom their testimony . . ." (R., p.7), and "[t]he [defense] Attorney engaged in plan[n]ing to allow the Prosecution[']s witnesses to engage in pre-trial and pre-testimony grooming . . ." (R., p.8.) By verifying that petition, Mr. Reid has declared under oath that these are true statements to the best of his knowledge, and those facts are admissible for the district court's consideration in a post-conviction case. *Mata*, 124 Idaho at 593; I.C. § 19-4907(a).

In addition, Mr. Reid filed an affidavit in support of his petition which also made various factual assertions: "all of the State[']s witnesses [engaged] in pre-trial, and pre-testimony communications allow[ing] their witnesses to groom their story," and "[the public defender's] lack of readiness [sic] to be prepared to defend his client in a meaningful manner." (Augmentation – Affidavit in Support of Post-Conviction Relief, p.2.) Affidavits present facts which are admissible in post conviction cases. See, e.g., *Mata*, 124 Idaho at 593, I.C. § 19-4907(a).

Therefore, the district court's assertion that there are insufficient facts to support Mr. Reid's petition is erroneous, revealing its decision to summarily dismiss that petition to be erroneous as well.

genuine issues of fact as to whether each and every one of those facts is accurate.⁵ See *Whitehawk*, 116 Idaho at 834. Because those facts are genuinely in dispute, the only question remaining is whether Mr. Reid would be entitled to relief if his assertion of the facts were correct (*i.e.*, whether those genuine issues of fact are material). As will be explained *infra*, if the issues of fact in this case are resolved in Mr. Reid's favor, he would be entitled to relief. Therefore, summary judgment in this case is inappropriate; it requires an evidentiary hearing. See *id.*; *Baldwin*, 145 Idaho at 153.

If true, Mr. Reid's verified pleadings indicate (among other things) that the prosecution's witnesses were allowed to tailor their testimony to each other, and his attorney was aware that those witnesses were synchronizing their stories and manufacturing testimony and did nothing to prevent that from happening. When the prosecution's witnesses are able to tailor their testimony, it infringes on the defendant's right to a fair trial. See *Geders v. United States*, 425 U.S. 80, 87 (1976); *State v. Huntsman*, 146 Idaho 580, 589 (Ct. App. 2008). The concept of "sequestering" witnesses to preserve the integrity of their individual testimony grows from the English-Germanic common law. *Geders*, 425 U.S. at 87 (quoting 6 J. Wigmore, *Evidence* § 1837, p.348 (3d ed., 1940)). It is designed to prevent witnesses from tailoring their testimony to one another and to assist the fact-finder with detecting less-than-credible testimony; essentially, to help ensure the trial process is fair. See *id.*; *Huntsman*, 146

⁵ The State's denial of a fact does not automatically disprove the fact, particularly when the denial is not accompanied by additional contradictory facts. *Whitehawk*, 116 Idaho at 834. Without contradictory facts, the record has only the facts set forth by Mr. Reid in his verified pleading and affidavit.

Those facts do not disprove themselves. As such, summary judgment was inappropriate in this case.

Idaho at 589. In Idaho, this principle is currently embodied in I.R.E. 615.⁶ *State v. Gertsch*, 137 Idaho 387, 395 (2001) (recognizing the interplay that could exist between exceptions listed in I.R.E. 615 and the constitutional right to a fair trial, but refusing to address the issue, as it had not been preserved for appellate review). The Court of Appeals has recognized the potential for a claim in this regard. *Floyd v. State*, 135 Idaho 379, 381-82 (Ct. App. 2000).

If the facts as Mr. Reid alleged them are true (which, at this stage, they are presumed to be), then his attorney would have not performed to objectively reasonable standards (*i.e.*, working to ensure Mr. Reid's trial was fair when he knew that the prosecution witnesses were synchronizing their testimony) and Mr. Reid would have been prejudiced (subjected to an unfair trial) by that failure. See *Geders*, 425 U.S. at 87; *Charboneau II*, 144 Idaho at 903; *Whitehawk*, 116 Idaho at 834; *Floyd*, 135 Idaho at 381-82. That satisfies the requirements to prove ineffective assistance of counsel and receive relief. See *Workman*, 144 Idaho at 525 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). As such, those genuine issues of fact are material. See, *e.g.*, *Whitehawk*, 116 Idaho at 834. Therefore, summary judgment in this case was inappropriate and the district court's order to that effect is in error. See, *e.g.*, *Workman*, 144 Idaho at 525; *Baldwin*, 145 Idaho at 153; *Charboneau II*, 144 Idaho at 903. This case should be remanded for an evidentiary hearing. See *id.*

⁶ I.R.E. 615 allows the district court, either at the request of one of the parties or on its own motion, to "order witnesses excluded so that they cannot hear the testimony of other witnesses." I.R.E. 615(a).

II.

The District Court Erred When It Denied Mr. Reid's Motion To Appoint Post-Conviction Counsel

A. Introduction

Because Mr. Reid's meritorious post-conviction claim was improperly summarily dismissed he is not only entitled to a remand for an evidentiary hearing, but he is also entitled to the assistance of court-appointed counsel in those proceedings. Because his claim is not frivolous, the district court's decision to deny him post-conviction counsel was also erroneous, and therefore, should be reversed as well.

B. Because Mr. Reid's Claim Presents The Possibility Of A Valid Claim, It Is Not Frivolous, And Therefore, He Is Entitled To Court-Appointed Counsel To Pursue That Claim

When a petitioner in a post-conviction claim requests the assistance of a court-appointed attorney, he is entitled to that attorney if his claim is not frivolous. *Charboneau v. State* (hereinafter, *Charboneau I*), 140 Idaho 789, 792 (2004). In this context, a frivolous claim is “not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense.” *Id.* (quoting *Brown v. State*, 135 Idaho 676, 679 (2001) (in turn quoting I.C. § 19-852(b)(3))).⁷ Ultimately, this means

⁷ Pursuant to the Idaho Supreme Court's decision in *Quinlan v. Idaho Comm'n for Pardons and Parole*, 138 Idaho 726 (2003), I.C. § 19-852 no longer applies to determinations of whether counsel is to be appointed in post-conviction proceedings. *Charboneau I*, 140 Idaho at 793. Rather, *Charboneau I* sets out a new framework for analyzing that issue, but warns the district courts to “keep in mind the admonition set forth in *Brown* about the typical problems with *pro se* pleadings.” *Id.* Specifically, “the trial court should keep in mind that petitions and affidavits filed by a *pro se* petitioner will often be conclusory and incomplete.” *Id.* at 792 (quoting *Brown*, 135 Idaho at 679). To that point, “facts sufficient to state a claim . . . may not be alleged because the *pro se* petitioner simply does not know what are the essential elements of a claim.” *Id.* As such, where the *pro se* petitioner alleges some facts tending to support his claim, counsel should be appointed in his case. *Charboneau I*, 140 Idaho at 793; *Brown*, 135

that, “[i]f the petitioner ‘alleges facts to raise *the possibility of* a valid claim,’” counsel should be appointed in that case. *Judd v. State*, 148 Idaho 22, 24 (Ct. App. 2009) (quoting *Charboneau I*, 140 Idaho at 793) (emphasis added). In fact, in *Charboneau I*, the petitioner was only able to assert that new evidence existed and indicated where that evidence was; he was unable, however, to actually present that new evidence with his petition for post-conviction relief. *Charboneau I*, 140 Idaho at 793. Nonetheless, the Idaho Supreme Court held that his assertion in his affidavit that the evidence existed in a particular location was sufficient to give rise to a possible claim, thereby entitling him to the assistance of counsel. *Id.*

In this case, Mr. Reid asserted that his attorney was ineffective for failing to ensure that he had a fair trial by, at least, preventing the prosecution witnesses from coordinating their testimony. (See R., p.8; Augmentation – Affidavit in Support of Post-Conviction Petition, p.2.) Those facts were set forth in his sworn and notarized statement, as well as his affidavit in support of his petition. (R., pp.4-8; Augmentation – Affidavit in Support of Post-Conviction Petition, p.2.) He asserted that the evidence of that issue existed in the record and transcripts of the underlying case, as well as in oral testimony to be presented at the evidentiary hearing. (R., p.27; Augmentation – Affidavit in Support of Post-Conviction Petition, p.2.) As was discussed in Section I, *supra*, those assertions gave rise to genuine issue of material fact which, if resolved in his favor, would entitle him to relief. Therefore, like the petitioner in *Charboneau I*, Mr. Reid alleged sufficient facts to give rise to a possible claim, and should have been

Idaho at 679. Such is the case with Mr. Reid, and he should have been appointed an attorney. *See id.*

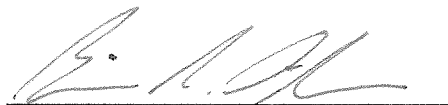
appointed appellate counsel. *Compare Charboneau I*, 140 Idaho at 793; *see Judd*, 148 Idaho at 24.

As such, because Mr. Reid alleged sufficient facts to establish the possibility of a valid claim, his petition for post-conviction relief is not frivolous, and therefore, he is entitled to the assistance of post-conviction counsel. *Charboneau I*, 140 Idaho at 792. As such, the district court's order denying post-conviction counsel should be reversed and this case should be remanded for an evidentiary hearing.

CONCLUSION

Mr. Reid respectfully requests that this Court reverse the district court's order summarily dismissing his post-conviction claims. In addition, he respectfully requests that this Court reverse the district court's order denying his request for post-conviction counsel. As a result, he respectfully requests this Court remand his case, with an order that the district court appoint post-conviction counsel and hold an evidentiary hearing in this case.

DATED this 13th day of February, 2013.

A handwritten signature in black ink, appearing to read "B. R. Dickson", is written over a horizontal line.

BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of February, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:


DARYL L REID
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ISCI
PO BOX 14
BOISE ID 83707

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DISTRICT JUDGE
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